No. 20,655

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RETAIL CLERKS UNION, LOCAL 770 Affiliated with Retail Clerks International Association,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

LOS ANGELES JOINT EXECUTIVE BOARD OF HOTEL & RESTAURANT EMPLOYEES & BARTENDERS UNION, AFL-CIO,

Intervenor.

On Petition to Review and Set Aside an Order of the National Labor Relations Board.

Brief of Intervenor, Los Angeles Joint Executive Board of Hotel and Restaurant Employees and Bartenders Union, AFL-CIO.

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TOPICAL INDEX

ARGUMENT.

I.

The National Labor Relations Board Properly Refused to Apply the Midwest Piping Doctrine to the Instant Case.

A. The Midwest Piping Doctrine Must Be Narrowly Construed Since the Doctrine Conflicts With Section 8(a)(5) of the National Labor Relations Act.

Section 8(a)(5) of the National Labor Relations Act,[1] provides that

> "it shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees. . . ."

There is no question whatever that at the time the employers recognized the Joint Board as the bargaining representative of their snack bar employees, the Joint Board represented a majority of those employees. In the case of Boy's Markets, the employer retained the accounting firm of J. R. McKnight & Associates to conduct a card check. In the case of Von's, the Council utilized Mr. Charles L. Lang, a public accountant, to conduct the card check. In both cases, of course, the accountants verified the Joint Board claim. The wording of Section 8(a)(5) thus imposed upon the employers the clear duty to recognize and bargain with the Joint Board.

The rule of *Midwest Piping and Supply Co., Inc.* (1945), 63 N.L.R.B. 1060, 17 L.R.R.M. 40, upon which petitioner premises its case, precludes an employer from recognizing one of two rival unions as the representative of its employees when a "real question of representation" exists.

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[1] 29 U.S.C. §158(a)(5).

The courts have, however, been extremely strict in their application of the *Midwest Piping* rule. This strictness stems from an awareness that the *Midwest Piping* rule is in derogation of Section 8(a)(5) of the Act.

The Board itself has stated that the *Midwest Piping* doctrine, "necessary though it is to protect freedom of choice in certain situations, can easily be in derogation of the practice of continuous collective bargaining, and should therefore, *be strictly construed and sparingly applied.*" (*Ensher, Alexander and Barsoon, Inc.* (1947), 74 N.L.R.B. 1443, 1445, 20 L.R.R.M. 1282; emphasis added.)

B. Application of Midwest Piping Is Inappropriate in the Instant Case Because the Joint Board Presented to the Employers Indisputable Proof of Majority Interest and Because Petitioner Made No Genuine Claim of Representation.

The courts have refused to apply *Midwest Piping* in several cases in which an employer has contracted with one of two contesting unions. The cases involving refusal to apply *Midwest Piping* fall into two categories: (1) those in which the union which has been recognized has presented to the employer unequivocal evidence of its majority interest; and (2) those in which the unrecognized union has made no genuine claim of majority interest. The decision of the National Labor Relations Board may be sustained by reference to either of these categories of cases.

We turn to the cases rejecting *Midwest Piping* upon the ground that the recognized union had presented unequivocal evidence of majority interest.

The contention that the courts must refuse to apply *Midwest Piping* if the recognized union has presented to the employer indisputable proof of majority interest, is demonstrated by *N.L.R.B. v. Indianapolis Newspapers* (7th Cir. 1954), 210 F. 2d 501. In *N.L.R.B. v. Indianapolis Newspapers,* the employer respondent's circulation department employees were represented by the Guild, a CIO union. During the period in which the Guild and the employer were negotiating a new contract, a majority of the circulation department employees became dissatisfied with the Guild and designated in its place a newly organized independent association. The Association's representatives presented to the employer petitions which bore the signatures of more than 60% of the affected employees. The employer checked the names on the petition against its payroll records and, finding that the signatures were valid, recognized the association as the unit's bargaining representative. The court reversed the order of the Board that the employer cease recognition of the Association and cease giving effect to the contract entered into with the Association. The court stated its holding as follows:

> "The Act forbids interference by an employer with the rights of his employees to bargain collectively, and, for that purpose to select their own bargaining representative. When two unions are vieing for a majority support of his employees, an employer must, of course, maintain a position of strict neutrality. He must refrain from any action which tends to give either an advantage over its rival; he may do nothing which tends to coerce his employees to join or to refrain from joining a particular union. Recognition of one competitor as

bargaining agent during this contest period, *absent proof of majority support,* is a proscribed act. [Citations omitted.]

"The Act does not require, however, that this neutrality continue until the last dissident voice is stilled. Indeed, in keeping with the purpose of the Act, harmonious employer-employee relations require that the instability inherent in a contest end when one contestant is able to muster majority support. Although the prize of recognition must not be employed coercively to influence the employees in making their decision, *once indisputable proof of majority choice is presented to the employer, the Act imposes on him a duty to award recognition to the agent so chosen by his employees.* . . . The decisive question in any case is whether there has been an uninfluenced expression of majority will; it matters not how that will be expressed. Although the result of a secret election may well be the most convincing means of expression, the election medium is by no means exclusive. However expressed, an employer is bound by the employees' determination. In doing so, he should be free of charges of unfair labor practices absent substantial evidence indicative of bad faith." (*Id.,* at p. 503-504; emphasis added.)

In *N.L.R.B. v. Corning* (1st Cir. 1953), 204 F. 2d 422, despite simultaneous efforts by both C.I.O. and A.F. of L. unions to organize the respondent's employees, respondent, after a card showing of A.F. of L. majority interest recognized and contracted with that union. The court reversed the Board decision finding an unfair labor practice. The court stated as follows:

same result follows when majority support for the recognized union exists, but has been achieved by coercion or some other unfair labor practice. But where a clear majority of the employees, without subjection to coercion or other unlawful influence, have made manifest their desire to be represented by a particular union, there is no factual basis for a contention that the employer's action thereafter in recognizing the union or contracting with it is an interference with their freedom of choice. This case is in this final category. [Citations omitted.]" (*Id.*, at p. 557.)

Applying the analysis in *Air Master Corp.* to the instant case, it is amply clear that the Board properly refused to invoke *Midwest Piping*. Petitioner makes no claim that the Joint Board represented only a minority of the snack bar employees, nor does the record contain evidence which could support a charge that the employee's choice was "demonstrably in doubt". Nor, of course is there any evidence that the Joint Board's majority interest was obtained by coercion or other unfair labor practice.

C. Application of Midwest Piping Is Inappropriate in the Instant Case Because Petitioner Never Attempted to Organize the Snack Bar Employees.

Application of the *Midwest Piping* doctrine in the instant case is inappropriate for a further reason. The policy which underlies that doctrine is one of insuring employer neutrality with respect to employee choice of bargaining representatives (*Midwest Piping Co., supra,* 63 N.L.R.B. 1060, 17 L.R.R.M. 40; *Sunbeam Corp.* (1952), 99 N.L.R.B. 546, 30 L.R.RM. 1094). The doctrine becomes relevant only when two or more unions

are vigorously soliciting employees and endeavoring to obtain their acceptance as a bargaining representative. In the instant case, with the exception of one visit to one Boy's location, Local 770 never directly solicited the employees. Local 770 made no efforts whatever to organize the snack bar employees. As stated by the Board in *Sunbeam Corporation, supra,* the *Midwest Piping* doctrine is applicable when "employees are simultaneously being organized by two or more labor organizations. . . ." (*supra,* 30 L.R.R.M. at 1096.)

The neutrality policy underlying the rule of *Midwest Piping* is not affected in a case in which the rival union is not even endeavoring to organize the employees themselves but is merely trying to incorporate them without vote or authority from them. In short, neutrality is not infringed unless two organizations are directly contesting for the employees themselves by direct organizational efforts made towards the employees. No "unwarranted prestige or advantage" (*Sunbeam Corporation, supra,* 30 L.R.RM. at p. 1096.) was afforded the Joint Board in its efforts to organize the employees, since Local 770 had made no significant overtures toward those employees. Application of the *Midwest Piping* doctrine to a situation in which there were no competing or conflicting organizational efforts directed at the employees themselves would represent an unreasonable extension of the doctrine.

D. The November-December, 1962, Correspondence Between Local 770 and Von's Did Not Create a Real Question of Representation Within the Meaning of the Midwest Piping Doctrine.

Intervenor intends to cover here the question of the effect of the 1962 correspondence between Von's and the Clerks.

The petitioner relied before the National Labor Relations Board upon its letter of November 23, 1962, in which Local 770 apparently claimed jurisdiction over certain employees working in the prepared foods take-out department of Von's Markets. Von's responded to that letter on December 4, 1962, stating its disagreement with the proposition that the employees were included within the coverage of the existing Retail Clerks Agreement. Following the employer's rejection of the claim of inclusion, Local 770 did nothing for approximately eight months about its purported claim of jurisdiction. Such letters do not constitute the type of "active and continuous claim"[3] of a majority representation required to invoke *Midwest Piping*. Indeed, the November 23rd letter represented at best a naked assertion of jurisdiction in an area in which such assertion was entirely unwarranted (See Argument II, *infra*).

II.

The Request by Local 770 for Expansion of Its Unit to Cover Snack Bar Employees, Without Giving Those Employees the Right to Vote, Constituted a Violation of Sections 8(a)(1) and (3) of the Act.

Petitioner's contention that its request to expand their market unit to encompass snack bar employees created a real question concerning representation is all the more difficult to sustain because that request was illegal, and the contract subsequently entered into covering previously nonrepresented snack bar employees, without their consent, was an illegal contract. (*Wolfer Printing*

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[3]*Novak Logging Co.* (1958), 119 N.L.R.B. 196, 197, 41 L.R.R.M. 1346, 1347.

(1964), 145 N.L.R.B. 70, 55 L.R.RM. 1025; *Atlantic Freight Lines* (1956), 117 N.L.R.B. 464, 39 L.R.R.M. 1256.)[4]

In *Wolfer Printing, supra,* a Local of the Pressmen's Union had a long standing contract with Wolfer Printing covering only pressmen. After 11 years of contractual relations between the parties covering pressmen, the parties signed an addendum to their contract extending the coverage to offset press employees who had previously not been covered. The Board held that by extending the contract to offset employees, without giving these employees an opportunity to decide whether or not they wished to join the Pressmen's Union, the employer violated Sections 8(a)(1), (2) and (3) of the Act.

In *Atlantic Freight Lines, supra,* the Union attempted to force an employer to expand his unit of truck drivers to include maintenance employees, without giving those maintenance employees the right to vote. The Board, in striking down the Union contract as unlawful, stated, in part:

> "It is settled policy of the Board not to sanction enlargement of an established bargaining unit by the addition of excluded distinct minority groups like maintenance and service employees involved,

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[4]A National Labor Relations Board Trial Examiner presently has under submission a complaint of the General Counsel charging Local 770, the Council, and certain retail food markets with an unfair labor practice in executing the 1964-1967 Clerks contract. The gravamen of the charge lies in the contention that the inclusion of the snack bar employees, without giving then an opportunity to select their bargaining representative, denied them basic rights to self-determination under Section 1 of the National Labor Relations Act. (29 U.S.C. 151). The case is designated by the National Labor Relations Board as Nos. 31-CA-146 and 31-CB-35.)

without first giving the minority groups the opportunity to express their preference as to whether or not they desire representation by the current bargaining agent, particularly where, as here, the minority groups might alone constitute separate bargaining units. (Zia Company 108 N.L.R.B., 34 L.R.R.M. 1133)".

Here there is no question that the snack bar employees would constitute a separate bargaining unit. The Board so held in *Piggly Wiggly of California* (1963), 144 N.L.R.B. 708, 54 L.R.R.M. 1119.

In view of the foregoing, to hold that Local 770's request for an expansion of its unit created a question of representation would be to sanction and encourage the illegal request of Local 770 which led to its illegal contract.

Conclusion.

For the reasons stated above, the intervenor requests the Court to dismiss the petition to review the order of the National Labor Relations Board.

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Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion the foregoing brief is in full compliance with those rules.

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August 9, 1966

William B. Luck, Clerk
United States Court of Appeals
For the Ninth Circuit
P.O. Box 547
San Francisco, California

Re: Retail Clerks Union, Local 770 v. National Labor Relations Board, No. 20655

Dear Mr. Luck:

Subsequent to the filing herein of the Brief of Intervenor, Los Angeles Joint Executive Board of Hotel & Restaurant Employees and Bartenders Union, a National Labor Relations Trial Examiner rendered his decision in the cases of Food Employers Council, Inc., et al., (N.L.R.B. Case Nos. 31 CA 146 and 31 CB 35) which cases were referred to in footnote 4 at page 11 of the Brief of Intervenor.

The decision of the Trial Examiner directly supports the arguments contained at pages 10 through 12 of the Brief of Intervenor. The trial examiner held as follows:

> "By extending the contract of April 1, 1964, which includes a union security provision, to cover snack bar employees, at a time when respondent Clerks did not represent a majority of such employees, respondent Council and respondent Clerks unlawfully infringed upon the right of the snack bar employees to express a free choice of their bargaining representative." (Emphasis added.)

The Trial Examiner's decision thus supplies direct support for Intervenor's contention that the request by Local 770 to the Council to expand its market unit to cover snack bar employees violated the National Labor Relations Act. (Intervenor's Brief, p. 10-12) The Trial Examiner has ruled that the contract, which represented the culmination of the Clerk's request, was illegal insofar as it included snack bar employees.

We therefore respectfully request that the Court include this supplemental citation in its consideration of this matter.

For the convenience of the Court we are enclosing herewith 20 copies of the above mentioned decision of the Trial Examiner in National Labor Relations Case Nos. 31 CA 146 and 31 CB 35..

Very truly yours,

L. R. Rothschild

Loren R. Rothschild
of BODLE & FOGEL

LRR:cj

Enclosures

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

FOOD EMPLOYERS COUNCIL, INC.

Respondent Employer

and

Case No. 31-CA-146
(Formerly 21-CA-6125)

LOS ANGELES JOINT EXECUTIVE BOARD OF HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS UNIONS, AFL-CIO; HOTEL, MOTEL, RESTAURANT EMPLOYEES AND BARTENDERS UNION, LOCAL 694, AFL-CIO

Charging Parties

and

THRIFTIMART, INC., GREAT A. & P. TEA CO., CRAWFORD STORES, LUCKY STORES, INC., HUGHES MARKETS, VON'S GROCERY CO., AND SAFEWAY STORES, INC.

Parties to the Contract

RETAIL CLERKS UNION, LOCAL 770
(Food Employers Council, Inc.)

Respondent Union

and

Case No. 31-CB-35
(Formerly 21-CB-2378)

LOS ANGELES JOINT EXECUTIVE BOARD OF HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS UNIONS, AFL-CIO; HOTEL, MOTEL, RESTAURANT EMPLOYEES AND BARTENDERS UNION, LOCAL 694, AFL-CIO

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Parties to the Contract

Stanley S. Sadur, of Los Angeles, Calif., for the General Counsel.
Joseph M. McLaughlin, of Los Angeles, Calif., for Respondent Council.
Arnold, Smith & Schwartz, by Kenneth M. Schwartz, of Los Angeles, Calif., for Respondent Clerks.
Kessler & Drasin, by Lawrence Drasin, of Los Angeles, Calif., for the Charging Party, Local 694.
Bodle & Fogel by Loren Rothschild, of Los Angeles, Calif., for the Charging Party, Joint Board.

Before: David Karasick, Trial Examiner.

TRIAL EXAMINER'S DECISION

Statement of the Case

This matter was heard at Los Angeles, California, on January 25 and 26, 1966. The complaint 1/ alleges that Food Employers Council, Inc., herein called Respondent Council and Retail Clerks Union, Local 770, herein called Respondent Clerks, and collectively called herein the Respondents, have engaged in unfair labor practices within the meaning of Section 8(a)(1), (2) and (3) and Section 8(b)(1)(A) and 8(b)(2) of the Act.

Upon the entire record in the case, 2/ and from my observations of the witnesses, I make the following:

Findings of Fact

I. The business operations of the employers

Respondent Council is a nonprofit corporation composed of employer-members, most of whom are engaged in the retail food market business in Southern California. Since about 1941, Respondent Council has bargained collectively for its members and has negotiated master collective-bargaining agreements with labor organizations, including Respondent Clerks.

The employer-members of Respondent Council during the course of their retail operations annually do a gross volume of business in excess of $500,000 and annually purchase and receive directly from points and places located outside the State of California goods and products valued in excess of $50,000.

Thriftimart, Inc., an employer-member of Respondent Council for the purposes of collective bargaining, operates retail food stores in the Southern California area, including stores at 2600 South Vermont Avenue, Los Angeles, California, and 20934 Roscoe Boulevard, Canoga Park, California, its only stores involved in this proceeding.

1/ The complaint was issued on November 16, 1965 following the filing of charges jointly by Local 694 and the Joint Board on August 20, 1964 in Cases Nos. 21-CA-6125 and 21-CB-2378 and first amended charges filed jointly by the same parties on September 3, 1965 in Cases Nos. 31-CA-146 and 31-CB-35.

2/ The unopposed post-hearing motion of the General Counsel to correct errors in the transcript is hereby granted.

Great A. & P. Tea Co., an employer-member of Respondent Council for the purposes of collective bargaining, operates retail food stores in the Southern California area, including a store located at 1835 South LaCienega Boulevard, Los Angeles, California, its only store involved in this proceeding.

Crawford Stores, an employer-member of Respondent Council for the purposes of collective bargaining, operates retail food stores in the Southern California area, including a store located at 1421 East Valley Boulevard, Alhambra, California, its only store involved in this proceeding.

Lucky Stores, Inc., an employer-member of Respondent Council for the purposes of collective bargaining, operates retail food stores in the Southern California area, including a store located at 10721 Atlantic Avenue, Lynwood, California, its only store involved in this proceeding.

Hughes Markets, an employer-member of Respondent Council for the purposes of collective bargaining, operates retail food stores in the Southern California area, including stores located at 14440 Burbank Boulevard, Van Nuys, California, 16940 Devonshire, Granada Hills, California, 4520 Van Nuys Boulevard, Sherman Oaks, California, 1100 North San Fernando Road, Burbank, California, and 10400 North Sepulveda, Mission Hills, California, its only stores involved in this proceeding.

Von's Grocery Co., an employer-member of Respondent Council for the purposes of collective bargaining, operates retail food stores in the Southern California area, including a store located at 6921 La Tijera Boulevard, Los Angeles, California, its only store involved in this proceeding.

Safeway Stores, Inc., was, until January 1965, an employer-member of Respondent Council for the purposes of collective bargaining, operates retail food stores in the Southern California area, including a store located at 4707 Venice Boulevard, Los Angeles, California, its only store involved in this proceeding.

Respondent Council and Thriftimart, Inc., Great A. & P. Tea Co., Crawford Stores, Lucky Stores, Inc., Hughes Markets, Von's Grocery Co., and Safeway Stores, Inc., each is, and has been at all times material herein, individually and collectively, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The labor organizations involved

Los Angeles Joint Executive Board of Hotel and Restaurant Employees and Bartenders unions, AFL-CIO, herein called the Joint Board; Hotel, Motel, Restaurant Employees and Bartenders Unions, Local 694, AFL-CIO, herein called Local 694; and the Respondent clerks are labor organizations within the meaning of Section 2(5) of the Act.

III. The unfair labor practices alleged

A. The issue

These proceedings arise as the result of a dispute between Respondent Clerks and Local 694 and the Joint Board over the right to represent snack bar employees of the employer-members of Respondent Council who are parties to a collective bargaining agreement entered into on their behalf by Respondent Council with Respondent Clerks. The primary issue is whether Respondent Council and Respondent Clerks were justified in extending the terms of their contract, which covered retail clerks of food markets in a multi-employer unit, to include snack bar employees of some of the employers at a time when Respondent Clerks did not represent a majority of the snack bar employees although it did represent a majority of the over-all group of employees covered by the contract.

B. The facts

The seven employer-members of Respondent Council involved in these proceedings operate retail food markets in Southern California and at all times material herein have been parties to a contract, entered into on their behalf by Respondent Council with Respondent Clerks, effective for a five year term from April 1, 1964 through March 31, 1969. This contract covers retail clerks who are engaged in food, bakery, candy and general merchandise operations and supersedes an earlier agreement between the same parties which ran from January 1, 1959 through March 31, 1964. At the time the earlier agreement was executed, no snack bars were in existence but during its term some of the employers who were parties to the agreement established such bars. 3/ However, the employees of these snack bars were not represented by Respondent Clerks. The contract of April 1, 1964 for the first time included snack bar employees in the unit, together with other categories of employees.

At the time the present contract was executed, Respondent Clerks did not represent a majority of the snack bar employees, as distinguished from the over-all group of employees covered. However, the Joint Board or Local 694 did then and presently does represent snack bar employees of some, but not all, of the employer-members of the Respondent Council who are parties to the April 1, 1964 contract. The existing agreement expressly excludes culinary employees who are represented by the Joint Board or Local 694. 4/ The General Counsel and the Charging Parties contend that the snack bars constitute a distinct and separate operation and that the snack bar employees were entitled to determine for themselves in an election whether they wish to be in-

3/ See The Boy's Markets, Inc., et al, 156 NLRB No. 6.
4/ The contract also expressly excludes from its coverage meat department employees and janitorial and maintenance personnel, both of which groups are represented by other unions.

cluded in the over-all unit. The Respondents, on the other hand, assert that the employees of the snack bars constitute an accretion to the pre-existing unit and were therefore properly covered by the terms of the April 1, 1964 agreement.

The parties stipulated that the snack bars involved in these proceedings prepare food which in some cases is consumed at counters or tables on the premises of the retail market in which the snack bar is located and on other occasions is consumed elsewhere; that the snack bars are located outside of the area of the check stands in the markets; that all purchases made at the snack bars are paid for at the snack bar registers; that there are no other employees in the stores or markets who perform the type of work done at the snack bars, although in emergencies clerks, clerks' helpers or box boys will relieve snack bar employees; that there is no interchange of employees between the snack bars and other departments of the stores, although on occasion snack bar employees have moved to other jobs within the stores; and that there is a department manager who has authority over the snack bars and who is responsible in turn to the store manager.

An examination of the provisions of the existing contract shows that the hours, wages and working conditions of snack bar employees are different from those of the other employees. Thus, split shifts are permitted for snack bar employees but prohibited for all other employees. A guarantee of 8 hours work at a Sunday premium rate of pay which is applicable to all retail clerks, except part-time clerks' helpers, is not applicable to snack bar employees. Employees of snack bars which operate as such exclusively receive the same wages as those accorded clerks' helpers but the present agreement provides that future wage increases shall either be the same as those negotiated for clerks' helpers "or those negotiated by the hotel and restaurant industry, whichever are greater". Snack bar employees are entitled to meals while other employees are not.

C. Concluding findings

The evidence thus shows that snack bar employees are engaged in a different type of work than that performed by the retail clerks in the food markets, that there is no interchange between such employees; that the snack bars are located outside the check stands of the markets and thus are physically separated from the areas where the other retail clerks work; that the snack bar employees are under separate supervision; that they may work split shifts; and that premium rates of pay for Sunday work are not applicable to them. It is thus clear that the terms and conditions of employment of snack bar employees are different from those of the retail clerks and that they have a community of interest apart from them. 5/

5/ See Piggly Wiggly California Company, 144 NLRB 708, 711. That case and The Boy's Markets, Inc. et al, 156 NLRB No. 6, both concern themselves with other questions arising as a result of the dispute between the Respondents and the Charging Parties in these proceedings in regard to the representation of snack bar employees.

Upon the foregoing facts and upon the record as a whole, I find that the snack bars were not an accretion to the existing unit but instead constituted a separate and distinct operation. By extending the contract of April 1, 1964, which includes a union-security provision, to cover snack bar employees, at a time when Respondent Clerks did not represent a majority of such employees, Respondent Council and Respondent Clerks unlawfully infringed upon the right of the snack bar employees to express a free choice of their bargaining representative. In so doing Respondent Council violated Section 8(a)(1), (2) and (3) and Respondent Clerks violated Section 8(b)(1)(A) and 8(b)(2) of the Act. 6/

IV. Conclusions of law

1. Respondent Council and its employer-members named herein are, individually and collectively, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Respondent Clerks is a labor organization within the meaning of Section 2(5) of the Act.

3. By applying the terms of the union-security contract of April 1, 1964 to the snack bar employees of the employer-members of Respondent Council, not otherwise covered by a collective bargaining agreement with another union, as mentioned above in Section III, Respondent Council has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1), (2) and (3) of the Act and Respondent Clerks has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) and 8(b)(2) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and 7 of the Act.

V. The remedy

Having found that the Respondents have engaged in unfair labor practices, I shall recommend that they cease and desist therefrom and that they take certain affirmative action designed to effectuate the policies of the Act.

6/ See Dura Corporation, 153 NLRB No. 54; Danker & Sellew Inc., 140 NLRB 824 enf'd 330 F. 2d (C.A. 2); Wolfer Printing Co., Inc., 145 NLRB 695. In view of the conclusions reached herein, I do not regard it as necessary to determine whether the over-all unit of retail clerks which includes all snack bar employees except those already represented by another union is inappropriate, as the Joint Council contends in its brief. The basic issue in these proceedings is whether the extension of recognition with respect to a specific group of employees was lawful, irrespective of the appropriateness of the unit set forth in the contract. See Bernhard-Altmann Texas Corporation, 122 NLRB 1289, 1291.

It shall be recommended, that Respondent Council withdraw all recognition from Respondent Clerks as collective-bargaining representative pursuant to the terms of the collective bargaining agreement of April 1, 1964, unless and until Respondent Clerks shall have been duly certified by the Board as such representative. It further shall be recommended that Respondent Council cease and desist from giving any force or effect to the said collective bargaining agreement executed and maintained by the Respondents, insofar as said agreement has been extended to cover snack bar employees, or to any modification, extension, supplement, or renewal thereof. However, nothing herein shall be construed as requiring Respondent Council or its employer-members to vary or abandon any wage, hour, seniority, or other substantive feature of their relations with their employees which have been established in the performance of said contract.

It also shall be recommended that Respondent Clerks cease and desist from acting as the collective bargaining representative of the snack bar employees of the employer-members of Respondent Council, unless and until Respondent Clerks shall have been duly certified by the Board as such representative, and that it shall refrain from seeking to enforce the collective bargaining agreement executed and maintained by the Respondents insofar as snack bar employees are concerned. 7/

The General Counsel urges in addition that the Respondents be required, jointly and severally, to reimburse the snack bar employees for all initiation fees, dues or other obligations paid by them pursuant to the provisions of the collective bargaining agreement in question. There is no evidence that the snack bar employees were coerced into joining or into signing check-off authorizations running to Respondent Clerks. In the absence of such evidence, the order sought by the General Counsel is unwarranted. 8/

RECOMMENDED ORDER

Upon the entire record in these proceedings, and the foregoing findings of fact and conclusions of law, it is recommended that Respondent Food Employers Council, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Contributing support to Retail Clerks Union, Local 770, or to any other labor organization of its employees.

(b) Recognizing Retail Clerks Union, Local 770, as the representative of the snack bar employees of its employer-members who are parties to the collective bargaining agreement of April 1, 1964, covering retail food, bakery, candy and general merchandise clerks, for the purpose of dealing with Food Employers Council, Inc., on behalf of its employer-members, con-

7/ Ellery Products Manufacturing Co., Inc., 149 NLRB 1388; Dura Corporation, 153 NLRB No. 54.

8/ Duralite Co., Inc., 132 NLRB 425, 429; Couch Electric Company et al.; 143 NLRB 662. Cf. Gladys A. Juett, etc., 137 NLRB 395; Wolfer Printing Co., Inc., 145 NLRB 695, 702.

cerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said labor organization shall have demonstrated its exclusive majority representative status pursuant to a Board-conducted election among said snack bar employees.

(c) Giving effect to the aforementioned collective bargaining agreement or to any extension, renewal, or modification thereof; provided, however, that nothing in the order here recommended shall require Food Employers Council, Inc. or its employer-members, to vary or abandon any wage, hour, seniority, or other substantive feature of said employer-members' relations with snack bar or other employees which have been established in the performance of the aforesaid collective bargaining agreement or to prejudice the assertion by the snack bar employees of any rights they may have thereunder.

(d) Encouraging membership in Retail Clerks Union, Local 770, or in any other labor organization, by conditioning the hire or tenure of employment or any term or condition of employment upon membership in, affiliation with, or dues payments to, any such labor organization, except as authorized in Section 8(a) (3) of the National Labor Relations Act, as amended.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Withdraw and withhold all recognition from Retail Clerks Union, Local 770, as the exclusive representative of the snack bar employees of its employer-members who are parties to the aforesaid collective bargaining agreement for the purposes of collective bargaining unless and until said labor organization has been duly certified by the National Labor Relations Board as the exclusive representative of such employees.

(b) Notify all snack bar employees of its employer-members that they need not join or maintain membership in Retail Clerks Union, Local 770, pursuant to the aforesaid agreement, as a condition of employment.

(c) Post at the food markets of each of the employer-members who are parties to these proceedings 9/ copies of the attached notice marked "Appendix A." 10/ Copies of said

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9/ N.L.R.B. v. E. F. Shuck Construction Company, Inc., et al., 243 F. 2d 519 (C.A. 9).

10/ In the event that this Recommended Order be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's order be enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER," shall be substituted for the words "A DECISION AND ORDER."

notice, to be furnished by the Regional Director for the Thirty-First Region, shall, after having been duly signed by an authorized representative of Respondent Food Employers Council, Inc., be posted by said Respondent immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to assure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the aforesaid Regional Director, in writing, within 20 days from the date of service of this Trial Examiner's Decision, what steps said Respondent has taken to comply herewith. 11/

Respondent, Retail Clerks Union, Local 770, its officers, agents, representatives, successors, and assigns, shall:

1. Cease and desist from:

(a) Causing or attempting to cause Respondent Food Employers Council, Inc., or its employer-members, to discriminate against snack bar employees by giving effect to its agreement of April 1, 1964, or to any extension, renewal, or modification thereof.

(b) Causing or attempting to cause Respondent Food Employers Council, Inc., or its employer-members who are parties to the collective bargaining agreement of April 1, 1964, to discriminate against snack bar employees by conditioning their hire or tenure of employment or any term or condition of employment upon membership in, affiliation with, or dues payment to, Respondent Retail Clerks Union, Local 770, except as authorized in Section 8(a)(3) of the National Labor Relations Act, as amended.

(c) In any like or related manner restraining or coercing snack bar employees of Respondent Food Employers Council, Inc., or its employer-members who are parties to the aforesaid collective bargaining agreement of April 1, 1964 in the exercise of the rights guaranteed them in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the National Labor Relations Act, as amended.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Post at its offices and meeting halls copies of the attached notice marked "Appendix B". 12/ Copies of said notice, to by furnished by the Regional Director for the Thirty-first Region, shall, after being duly signed by an authorized representative of Respondent Retail Clerks Union, Local 770, be

11/ In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this order, what steps the Respondent has taken to comply herewith."

12/ See footnote 10/, supra.

posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(b) Mail to the Regional Director for the Thirty-first Region signed copies of the attached notice marked "Appendix B" for posting by Respondent Food Employers Council, Inc., at the food markets of each of the employer-members who have been made parties to these proceedings, as provided herein. Copies of said notice, to be furnished by the Regional Director, shall, after being duly signed by an authorized representative of Respondent Retail Clerks Union, Local 770, be forthwith returned for such posting.

(c) Post at the same places, and under the same conditions as set forth in (b) immediately above, as soon as they are forwarded by the Regional Director, copies of Respondent Food Employers Council, Inc.'s attached notice marked "Appendix A".

(d) Notify said Regional Director, in writing, within 20 days from the date of the service of this Trial Examiner's Decision, what steps said Respondent has taken to comply herewith. 13/

It is further recommended that unless, within said 20 day period, the Respondents shall have notified said Regional Director, in writing, that they will comply with the foregoing Recommended Order, the National Labor Relations Board issue an order requiring the Respondents to take the action aforesaid.

Dated: JUL 22 1966

David Karasick
Trial Examiner

13/ See footnote 11/, supra.

APPENDIX A

NOTICE TO ALL SNACK BAR EMPLOYEES OF THRIFTIMART, INC.; GREAT A. & P. TEA CO.; CRAWFORD STORES; LUCKY STORES, INC.; HUGHES MARKETS; VON'S GROCERY CO.; AND SAFEWAY STORES, INC.

PURSUANT TO

A RECOMMENDED ORDER OF A TRIAL EXAMINER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT recognize Retail Clerks Union, Local 770, as the exclusive bargaining representative of snack bar employees of the employer-members of Food Employers Council, Inc., who are parties to the contract of April 1, 1964, unless and until that Union has been certified by the National Labor Relations Board.

WE WILL NOT give effect to our agreement of April 1, 1964 with Local 770, or to any extension, renewal or modification thereof, to the extent that said agreement purports to cover snack bar employees, and we will not require that said snack bar employees be or become members of Local 770, as a condition of employment pursuant to the provisions of the foresaid agreement with that Union. The law does not require us, however, to give up or to vary the wages, hours, seniority, or other working conditions now in effect by reason of said contract.

WE WILL NOT contribute support to Local 770, or to any other labor organization of our employees.

WE WILL NOT encourage membership in Local 770, or in any other labor organization, by conditioning the hire or tenure of employment or any term or condition of employment upon membership in, affiliation with, or dues payments to, any such labor organization, except as authorized by Section 8 (a)(3) of the National Labor Relations Act, as amended.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7 of the Act.

All employees are free to become, to remain or to refrain from becoming or remaining, members of the above-named labor organization or any other labor organization.

FOOD EMPLOYERS COUNCIL, INC.
by and on behalf of:
THRIFTIMART, INC.; GREAT A. & P. TEA CO.;
CRAWFORD STORES; LUCKY STORES, INC.;
HUGHES MARKETS; VON'S GROCERY CO.; AND
SAFEWAY STORES, INC.
(Employer)

Dated ..... By .....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions,

APPENDIX B

NOTICE TO ALL SNACK BAR EMPLOYEES OF THRIFTIMART, INC.; GREAT A. & P. TEA CO.; CRAWFORD STORES; LUCKY STORES, INC.; HUGHES MARKETS; VON'S GROCERY CO.; AND SAFEWAY STORES, INC.

PURSUANT TO

THE RECOMMENDED ORDER OF A TRIAL EXAMINER

of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT give effect to the collective bargaining agreement of April 1, 1964 between Food Employers Council, Inc., on behalf of the above-named employers, and ourselves to the extent that such agreement seeks to cover snack bar employees of employer-members of Food Employers Council, Inc. who are parties to the agreement.

WE WILL NOT act as the exclusive bargaining representative of snack bar employees of the employer-members of Food Employers Council, Inc. who are parties to the collective bargaining agreement of April 1, 1964, or any extension, renewal or modification thereof, unless and until we have been duly certified by the National Labor Relations Board as the exclusive representative of said snack bar employees. The law does not require, however, that any change be made in the wages, hours, seniority, or other working conditions now in effect by reason of that contract.

WE WILL NOT cause or attempt to cause Food Employers Council, Inc., or its employer-members who are parties to the collective bargaining agreement of April 1, 1964, to discriminate against snack bar employees by conditioning their hire or tenure of employment or any term or condition of employment upon membership in, affiliation with, or dues payments to, Local 770, except as authorized in Section 8(a)(3) of the National Labor Relations Act, as amended.

WE WILL NOT in any like or related manner restrain or coerce the snack bar employees of the employer-members of Food Employers Council, Inc., who are parties to the collective bargaining agreement of April 1, 1964, in the exercise of the rights guaranteed them in Section 7 of the Act.

RETAIL CLERKS UNION, LOCAL 770
(Labor Organization)

Dated_____ By_____
(Representative) (Title)

This notice must remain posted for 60 days from the date of posting, and must not be altered, defaced, or covered by any other material.

In the event of any question concerning this notice or compliance with its provisions, employees may communicate directly with the Board's Regional Office, 10th Floor, Bartlett Building, 215 West Seventh Street, Los Angeles, California 90014 (Tel. No. 688-5840).